No. 91-33

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LEONARD CASTIGLIONE, ANTHONY DONATO, and
WILLIAM HENDRICKS,
Petitioners,

vs.

JACK LEE HARRIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS FOR REVIEW:

(1) Does the purely objective standard set out in *Harlow v Fitzgerald*, 457 U.S. 800 (1981) for resolution of the issue of qualified immunity apply in cases where the plaintiff can only obtain damages if the official's culpable state of mind is established?

(2) Did the Ninth Circuit apply the law at a level of generality prohibited by *Anderson v Creighton*, 483 U.S. 635 (1987)?

PARTIES TO PROCEEDING IN NINTH CIRCUIT COURT OF APPEALS:

The names of all parties appear in the caption of the case. The CITY OF PITTSBURG was the only Defendant not a party to the individuals' motion for summary judgment based on qualified immunity.

TABLE OF CONTENTS AND AUTHORITIES:

TABLE OF CONTENTS

	Page
Questions for Review	i
Parties to Proceeding in Ninth Circuit Court of Appeals	ii
Table of Contents and Authorities	iii
Reports of Opinions Delivered in the Case by Other Courts	2
Grounds on Which Jurisdiction of This Court is Invoked	2
Constitutional Provisions and Statutes Involved in this Case	2
Statement of the Case	3
Review of State Court Judgment	4
Basis for Federal Jurisdiction in the Court of First Instance	4
Reasons for Review	5
Appendix	A-1

TABLE OF AUTHORITIES

Federal Cases

Page

Allen v Scribner, 812 F.2d 426 (9th Cir. 1987) 5

Anderson v Creighton, 483 U.S. 635 (1987) ..... i, 4, 5, 6, 7

Harlow v Fitzgerald, 457 U.S. 800 (1981) ..... i, 4, 5, 6

Pickering v Board of Education, 391 U.S. 563 (1968) 7

Soranno's Gasco, Inc. v Morgan, 874 F.2d 1310 (9th Cir. 1989) 5, 6

Federal Statutes

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1291 5

28 U.S.C. Section 1331 4-5

42 U.S.C. Section 1983 ..... 2, 3

Other

United States Constitution, First Amendment 2, 3, 4

United States Constitution, Fourteenth Amendment 3, 4

No. _____

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LEONARD CASTIGLIONE, ANTHONY DONATO, and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS:

(1) Memorandum and Order, No. C-86-2101 MHP, filed July 7, 1989 (United States District Court, Northern District of California).

(2) Memorandum, No. 89-16024, filed March 18, 1991 (United States Court of Appeals for the Ninth Circuit).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED:

(1) The date of entry of the judgment sought to be reviewed was March 18, 1991.

(2) Jurisdiction of United States Supreme Court:

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE:

(1) 42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2) United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

(3) United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens for the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE:

In May 1985, Plaintiff was terminated from his position as police sergeant for the Pittsburg Police Department. The grounds for his termination were set out in a memorandum entitled Notice of Intent to Terminate dated April 26, 1985. See Notice of Intent to Terminate, Appendix at Page A-19. Plaintiff does not dispute the grounds for termination, but only the subjective motivation for his termination. He claims the grounds for his termination were a pretext and that Defendants' motive was to retaliate against Plaintiff for the exercise of his First Amendment rights.

Plaintiff brought an action in the United States District Court for the Northern District of California in San Francisco under 42 U.S.C. Section 1983, claiming that the termination violated his First and Fourteenth Amendment rights. The individual Defendants named in this claim are Leonard Castiglione, Pittsburg Police Chief; Anthony Donato, City Manager of Pittsburg; and William Hendricks, Pittsburg Police Sergeant (now Lieutenant).

These Defendants brought a motion for summary judgment in September 1987 on the grounds that, as a matter of law, they were entitled to qualified immunity.

The District Court denied Defendants' motion on the grounds that in May 1985, the law was clearly established that a public

employee could not be terminated in retaliation for exercising his First Amendment rights and that a disputed issue of fact existed as to the motivation for Plaintiff's termination. The Court also ruled that Plaintiff's Fourteenth Amendment claim presented a triable issue of fact regarding Defendants' intent.

Defendants appealed the District Court's decision to the Ninth Circuit Court of Appeals, arguing that: (1) the law was not clearly established that Plaintiff's termination was unlawful under the First or Fourteenth Amendments where the particular circumstances are analyzed according to *Anderson v Creighton*, 483 U.S. 635 (1987); and (2) no disputed issue of fact precluded summary judgment because Plaintiff did not dispute the *reasons* for his termination and Defendants' *subjective* motivation is irrelevant under *Harlow v Fitzgerald*, 457 U.S. 800 (1981).

The Ninth Circuit affirmed the District Court, holding that the law was clearly established that Plaintiff could not be terminated in retaliation for exercising his First Amendment rights, and a disputed issue of fact existed regarding Defendants' subjective motivation. The Ninth Circuit did not address the Fourteenth Amendment issue.

Defendants appeal to this Court because both the District Court and the Ninth Circuit erred by (1) considering the subjective motivation of Defendants in direct contradiction of the rule of *Harlow v Fitzgerald, supra*, 457 U.S. 800; and (2) applying the law to the facts of this case at a level of generality prohibited by *Anderson v Creighton, supra*, 483 U.S. 635 and thereby ruling that the law was clearly established when it was not.

REVIEW OF STATE COURT JUDGMENT:

Not applicable.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE:

The United States District Court for the Northern District of California had federal jurisdiction over this case under 28 U.S.C.

Section 1331; the United States Court of Appeals for the Ninth Circuit had jurisdiction over the case under 28 U.S.C. 1291.

REASONS FOR REVIEW:

Defendants seek review by this Court because the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

This Court has not decided the issue of whether a dispute over a public official's state of mind makes summary judgment on qualified immunity grounds improper where the underlying constitutional violation requires that the official has acted with a culpable state of mind. However, in their dissenting opinion in *Anderson v Creighton, supra*, 483 U.S. 635, Justices Stevens, Brennan, and Marshall stated that *Harlow* may be inapplicable in cases where "the plaintiff can obtain damages if the official's culpable state of mind is established." *Id.*, 483 U.S. at 656, fn. 12, citing *Allen v Scribner*, 812 F.2d 426 (9th Cir. 1989).

The Ninth Circuit has ruled that summary judgment on the ground of qualified immunity is improper where a disputed issue of fact exists regarding the subjective motivation of the defendant, where the underlying constitutional violation requires a culpable state of mind. See *Allen v Scribner, supra*, 812 F.2d at 436; *Soranno's Gasco, Inc. v Morgan*, 874 F.2d 1310 (9th Cir. 1989). The Ninth Circuit followed *Allen* and *Soranno's Gasco* in the instant case. The Ninth Circuit erred in light of the principles set forth by this Court.

In *Harlow v Fitzgerald*, this Court held that a defendant's entitlement to qualified immunity must be decided by determination of the *objective* reasonableness of the official's conduct. *Id.*, 457 U.S. at 818. The official's *subjective* beliefs are irrelevant. *Id.*, 457 U.S. at 817-818.

If *Harlow* does not apply to cases where the public official's state of mind is an element of the alleged underlying constitutional violation, the protection that *Harlow* sought to provide to public officials will be effectively lost in First and Fourteenth

Amendment cases (such as the instant case) as well as in any case where a culpable state of mind is an element of the alleged constitutional violation. Thus, this important question should be decided by this Court.

Furthermore, the resolution of this question by the Ninth Circuit, that summary judgment is precluded where a disputed issue of fact exists as to a defendant's motive, conflicts with applicable decisions of this Court. In *Harlow*, a First Amendment case, this Court stated that the subjective component of the qualified immunity analysis referred to " 'permissible intentions.' " *Harlow, supra*, 457 U.S. at 815. This Court then expressly rejected this component. *Id.*, 457 U.S. at 815-818. *Anderson v Creighton, supra*, reaffirmed this Court's determination that subjective beliefs are irrelevant. *Id.*, 483 U.S. at 641. The relevant question is whether a reasonable official "*could*" have believed his conduct to be lawful. *Id.*

The Ninth Circuit's holding in *Soranno's Gasco, Inc. v Morgan, supra*, directly contradicts *Anderson v Creighton. Soranno's Gasco* held that a disputed issue of fact regarding the official's motivation precluded summary judgment. *Id.*, 874 F.2d at 1315. The court stated that although the official *could* have denied a permit to the plaintiff, whether he *would* have done so absent the plaintiff's political expression presented an issue of fact for the jury. *Id.*, 874 F.2d at 1316. This was an impermissible resurrection of the subjective element which *Harlow* abolished.

The Ninth Circuit followed *Allen* and *Soranno's Gasco* and denied Defendants' motion for summary judgment in the instant case. That decision conflicts with this Court's rulings in *Harlow* and *Anderson.*

Finally, the Ninth Circuit applied the law at a level of generality prohibited by *Anderson v Creighton, supra*, 483 U.S. 635. First, the court's ruling that the law was clearly established that Defendants could not terminate Plaintiff in retaliation for the exercise of his First Amendment rights was not arrived at by balancing the employer's interest against that of the employee's

(i.e. disruption in the workplace versus whether Plaintiff spoke as a concerned citizen regarding a matter of public concern) or a case by case basis, as set out in *Pickering v Board of Education*, 391 U.S. 563 (1968). Second, the court did not consider Defendants' reliance on the advice of counsel as a circumstance relevant to the issue of whether the law was clearly established. Third, the court did not consider whether the law was clearly established regarding the specific circumstances of Defendant Hendricks, who had no authority to terminate Plaintiff, and merely followed the orders of his superiors in preparing a report of the incident.

Anderson v Creighton requires that the court examine the particular circumstances. *Id.*, 483 U.S. at 640. It is error to assert only the general right of the Plaintiff and hold that the law was clearly established.

Therefore, Defendants' Petition for Writ of Certiorari should be granted.

DATED: June 12, 1991

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Appendix A

Not for Publication

In the United States Court of Appeals

For the Ninth Circuit

Jack Lee Harris,
Plaintiff-Appellee,

v.

City of Pittsburg,
Defendant,

and

Leonard Castiglione, individually and in his capacity as Chief of Police for the City of Pittsburg; Anthony Donato, individually and in his capacity as City Manager of the City of Pittsburg; William Hendricks,
Defendants-Appellants.

No. 89-16024

D.C. # CV-86-2101-MHP

Memorandum*

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding
Argued and Submitted December 10, 1990
Pasadena, California

Before: Sneed, Schroeder, and Canby, Circuit Judges.

Plaintiff Jack Harris, formerly a sergeant with the Pittsburg Police Department, filed this action against the Pittsburg Police Chief, the City Manager, and a fellow police officer. Harris claims that his dismissal from the police force violated his rights under 42 U.S.C. § 1983 and the equal protection clause. The defendants moved for summary judgment, claiming they enjoyed qualified immunity from liability. The district court denied this motion,

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* This dispostion is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

and the defendants now appeal pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

The defendants claim that, as municipal government officials, they are immune from section 1983 liability, and that the district court therefore erred in denying their motion for summary judgment. The Supreme Court has held that government officials enjoy qualified immunity from section 1983 liability for actions performed in the course of their official duties. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To survive a motion for summary judgment on qualified immunity grounds, the plaintiff must allege a violation of clearly established law, and there must exist a genuine issue of fact as to whether the defendant committed the relevant acts. *Mitchell*, 472 U.S. at 526 (citations omitted).

A genuine issue of fact exists with regard to the actual subjective motivation of the defendants. There is evidence in the record to permit a trier of fact to infer that the motivation for Harris' discharge, as he contends, was to punish him for his speech; the defendants claim the discharge was motivated by Harris' violation of departmental rules and policies. The defendants' motive in firing Harris is a substantive element of the constitutional violation alleged, and is a disputed question of fact that must be presented to the jury. Therefore, the district court was correct in holding that summary judgment was not appropriate. *Allen v. Scribner*, 812 F.2d 426, 436 (9th Cir. 1987); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1319 (9th Cir. 1989); *see Pickering v. Board of Educ.*, 391 U.S. 563, 574-75 (1968) (school board cannot terminate teacher in retaliation for critical letter); *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983) (police officer cannot be terminated in retaliation for speech given to city council); *O'Brien v. Town of Caledonia*, 748 F.2d 403, 409 (7th Cir. 1984) (police officer cannot be disciplined for reporting departmental irregularities to authorities); *Brockell v. Norton*, 732 F.2d 664, 669 (8th Cir. 1984) (police dispatcher cannot be terminated in retaliation for violating chain of command to report wrongdoing).

Harris' request for sanctions is denied.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Jack Lee Harris,
Plaintiff,

vs.

City of Pittsburg, et al.,
Defendants.

No. C-86-2101 MHP

MEMORANDUM AND ORDER

This case is before the court on a writ of mandamus from the Ninth Circuit Court of Appeals.[1] The Ninth Circuit directed this court to "enter a written order determining whether the alleged conduct of defendants William Hendricks, Leonard Castiglione and Anthony Donato violated Jacke [sic] Lee Harris' clearly established rights." *Order*, (April 4, 1989) at 1 (citing *Order*, October 22, 1987).

This court finds that defendants' alleged conduct, if proven, violated plaintiff's clearly established rights. Because defendants' assertions of qualified immunity involve a fact-intensive inquiry inappropriate for resolution on summary judgment, the motion for summary judgment is denied.

BACKGROUND

Plaintiff, Sergeant Jack Lee Harris, brought an action under 42 U.S.C. § 1983 against his employer, the City of Pittsburg, California, and several defendants in their individual and official capacities. Defendants moved for summary judgment, which the court granted in part and denied in part. *Order, Harris v. Pittsburg*, (CV-86-2101 MHP, N.D. Cal., August 12, 1987). In the remaining claims, Harris alleged that he was fired in May 1985 for exercising his right to freedom of speech and that by terminat-

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[1] Order, *Hendricks, v. United States District Court*, (9th Cir., No. 87-7443, April 4, 1989, served June 19, 1989).

ing him defendants violated his rights under the first amendment. Harris also alleged violation of his right to equal protection and due process under the fourteenth amendment. Finally, Harris alleged pendent state claims for wrongful termination and bad faith breach of the implied covenant of good faith and fair dealing.

Shortly before trial, at the hearing on defendants' motion for summary judgment and plaintiff's motion to strike affidavits, defendants moved to dismiss the claims against the remaining individual defendants on the theory of "good faith" immunity.[2] *See* Tr. I at 27. The court refused to consider the defendants' new theories without written briefs. *Id.* at 28. With the trial date less than two months away, the court allowed the parties to submit short pretrial briefs on the issue of qualified immunity. *Id.* at 36.[3]

Defendants submitted a brief which they characterized as a "motion for summary judgment" based on "good faith" immunity. However, the court's ruling did not allow the parties to embark upon a new round of summary judgment motions, and it did not in any way contemplate a motion like that of defendants which contained facts and theories not previously heard. The parties argued the issue of qualified immunity at the pretrial hearing. *See* Transcript of Proceedings, September 10, 1987 ("Tr. II"). In support of their motion defendants argued that they

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[2] In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court uses the terms "good faith" or qualified immunity. However, the Court stressed that the inquiry was based primarily on objective factors. To avoid any confusion, this court uses the term "qualified immunity" when discussing the threshold issue to be resolved at the summary judgment stage under *Harlow*. 457 U.S. at 818.

[3] Defendants were not given leave to file a motion for summary judgment at that late date. *See* Transcript, July 20, 1987 ("Tr. I") at 36. Their papers were incorrectly characterized as a motion for summary judgment in an attempt to bring them within the guidelines set out by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). As such, defendants' motion is an inappropriate vehicle for the interlocutory appeal allowed by *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

relied on superiors' orders, the advice of counsel,[4] the advice of other police chiefs, and that their conduct was therefore reasonable.

This court had already determined that there existed clearly settled law that plaintiff's communications were protected speech at the time of his termination. *Order, Harris v. Pittsburg*, (CV-86-2101 MHP, N.D. Cal., August 12, 1987). Since the issues raised by defendants were based on a fact-intensive record, the court issued an oral order denying defendants' "self-styled" motion. Tr. II at 33.[5]

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[4] The court notes that by asserting the defense of reliance on advice of counsel, defendants waive the privilege associated with attorney/client communications. *See* 8 J.H. Wigmore, *Evidence* § 2327 (1961 & Supp. 1987) (at 564 & 156); *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981) (voluntary disclosure of the content of a privileged attorney communication, even if inadvertent, "constitutes waiver of the privilege as to all other such communications on the same subject").

[5] The court's denial of defendants' motion for summary judgment based on "good faith" immunity was grounded on the principle that whether the defendants' conduct was reasonable was a fact-based question not capable of resolution on summary judgment. The court explicitly stated:

> On the immunity issue that you raised by summary judgment, although I like to get rid of things on summary judgment, it is a fact question. Despite what *Anderson* . . . say[s] it is, this is not one of those cases where it can be disposed of on summary judgment. There are facts of [sic] dispute as to the reasonableness of [defendants'] conduct.

Tr. II at 11-12.

Additionally, the court was concerned with the defendants' assertion that their conduct was reasonable because they had relied on advice of counsel in firing plaintiff. If evidence of reliance was to be introduced, it would necessitate calling the attorney who had provided the advice, and thus the attorney/client privilege would have to be waived. At the time of the hearing, the attorney had not yet been deposed.
TR. II at 13.

Defendants filed a Notice of Appeal relying on *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that a district court's denial of a claim of qualified immunity, *to the extent it turns on an issue of law*, is an appealable final decision under 28 U.S.C. § 1291). As apparent from the following discussion, the court's ruling turned on the fact that the law as it existed in 1985 unquestionably established that defendants' alleged conduct violated plaintiff's clearly established rights. The new grounds raised by defendants did not relate to the objective "clearly settled law" standard, but to defendants' subjective reliance upon advice and orders that involve disputed issues of fact. Therefore, whether or not defendants acted reasonably and in good faith in the instant case is a question for the trier of fact. Denial of defendants' motion for summary judgment on the basis of qualified immunity was, therefore, proper under Federal Rule of Civil Procedure 56(c).[6]

LEGAL STANDARD

Assuming, arguendo, that the motion before the court was properly a motion for summary judgment, the court resolves the issues presented under the standards for such motions. Summary judgment is appropriate only if there are no disputed genuine issues of material fact. Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). The court's function, however, is not to make credibility determinations. *Id.* at 249. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W.*

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[6] The rule states in pertinent part: "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982) where the Court stated that courts must look at the record and draw all inferences in favor of the opposing party on a motion for summary judgment.

Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987).

When a defendant in a civil rights action raises the defense of qualified immunity,[7] the court may determine on summary judgment the objective reasonableness of the public official's conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has held that "[s]tate officials cannot be held liable for damages under section 1983 unless their conduct violates a clearly established constitutional right." *Wood v. Ostrander*, ____ F.2d ____, No. 87-3924, slip op. 6879, 6892 (9th Cir. June 27, 1989) (citing *Davis v. Scherer*, 468 U.S. 183, 194 (1984), *reh'g denied*, 468 U.S. 1226 (1984)).

A court must use the objective, "reasonable person" standard to ascertain if a defendant knew or should have known that the rights at issue were "clearly established." *Harlow*, 457 U.S. at 818-19; *see also Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir. 1986). "The decisive fact is not that [the official's] position turned out to be incorrect, but that the question was open at the time he acted." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). The court may determine whether "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

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[7] The claim of qualified immunity is an affirmative defense which the defendants have the burden of pleading. *Gomez v. Toledo*, 446 U.S. 635 (1980); *Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir. 1986). Failure to plead qualified immunity amounts to a waiver of the defense. *Kelson v. City of Springfield*, 767 F.2d 651, 657 (9th Cir. 1985). Once plead, the burden of pleading the defense lies with the official asserting it. *Benigni v. Hemet*, ____ F.2d ____, No. 87-5622, slip op. 6295, 6310 (9th Cir. June 15, 1989) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)); *see also Harris v. City of Roseburg*, 664 F.2d 1121, 1129 (9th Cir. 1981) (good faith is an affirmative defense which must be proved by the official).

DISCUSSION

In support of their argument for qualified immunity, defendants rely primarily on the Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the United States Supreme Court created an objective test to resolve the question of a government official's qualified immunity from civil liability. *Id.* at 818.

> *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability. . . .

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original). If a court finds that the law was clearly established, the defendants are not shielded from suit by qualified immunity, since reasonably competent public officers should know the law governing their conduct. *Harlow*, 457 U.S. at 818-19; *see also Lum v. Jensen*, ____ F.2d ____, No. 87-2896, slip op. 5796, 5800 (9th Cir. May 31, 1989).

However, a public official may be allowed to plead and prove "extraordinary circumstances" such that he or she neither knew nor should have known of the relevant legal standard. In such a case, the defense of qualified immunity may be sustained. *Id.* at 819. Even so, the defense must "turn primarily on objective factors." *Id.*

Defendants' claims of qualified immunity present disputed material facts and are therefore merely a defense and not an immunity from suit. *See Mitchell*, 472 U.S. at 526. With critical material facts in dispute, on the eve of trial, summary judgment was inappropriate. *See Wood v. Ostrander*, slip op. at 6902 (holding that if plaintiff were able to prove at trial the facts she alleged in support of her section 1983 action, defendant officer was not entitled to claim qualified immunity based on a reasonable officer standard); *Velasquez v. Senko*, 813 F.2d 1509, 1511 (9th Cir. 1987) (district court's denial of qualified immunity was not immediately appealable where it did not present a purely legal

issue separate from the merits, but presented a disputed factual issue).[8] Consequently, denial of defendants' motion was appropriate.

I. First Amendment Claims

Harris alleged that he was fired in May 1985 in violation of the first amendment for exercising his right of freedom of speech. Harris had spoken out against corruption and favoritism that allegedly plagued the Pittsburg Police Department. The exercise of this right, he claims, eventually cost him his job.

By May 1985, well-established Supreme Court precedent prohibited employers from firing employees who exercised their right to criticize their employer and spoke out on matters of public concern, such as corruption in the workplace. *See, e.g., Connick v. Myers,* 461 U.S. 138 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (stating that it is important to achieve a balance between the interests of the teacher employee, "as a citizen, in the community upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees"); *see also Order, Harris v. Pittsburg,* (CV-86-2101 MHP, N.D. Cal., August 12, 1987).

Furthermore, by May 1985 this circuit had also found that " 'policemen, like teachers and lawyers [. . .] are not relegated to a watered-down version of constitutional rights.' " *Kannisto v. City and County of San Francisco*, 541 F.2d 841, 843 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (quoting *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967)). A police officer's right to first amendment protection is "substantial because, as a member of the department, he is a person 'extraordinarily able to inform the public of deficiencies in this important governmental department.' " *Kannisto*, 541 F.2d at 843; *Cf. Pickering*, 391 U.S. at 572 (members of a specific community are most likely to have

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[8] *See also Kovats v. Rutgers*, 822 F.2d 1303, 1313-14 (3d Cir. 1987) (where factual issues of merit and qualified immunity issue were intertwined, denial of summary judgment based on qualified immunity was appropriate).

informed and definite opinions about that community and must be able to speak out without fear of retaliatory reprisal); *see also Leonard v. Columbus*, 705 F.2d 1299, 1305 (11th Cir. 1983), *reh'g denied*, 716 F.2d 914, *cert. denied sub nom. Columbus v. Leonard*, 468 U.S. 1204 (1984) (first amendment violated when Black police officers were fired for failing to obey a city resolution requiring the flag patch on police uniforms).

Indeed, in a case directly on point, this circuit has held that when an employee was terminated in May 1985, the law clearly established that "a government employee could not with impunity be discharged in retaliation for the exercise of his first amendment rights." *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1211-12 (9th Cir. 1988) (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1987) ("a discharged government employee may 'establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms' ") and *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech"). *See also Mabey v. Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976) (retaliatory termination based on employee's exercise of first amendment rights is unlawful).

Additionally, at the time Harris was fired, other circuits and California courts had held that the breach of the chain of command by a confidential report to an investigative agency merited first amendment protection. *See, e.g., O'Brien v. Town of Caledonia*, 748 F.2d 403, 409 (7th Cir. 1984) (enjoining retaliatory discipline imposed upon a police officer who reported departmental irregularities to authorities); *Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir. 1984) (quoting *Atcherson v. Siebenmann*, 605 F.2d 1058, 1063 n.5 (8th Cir. 1979) (enforcing the chain-of-command rule "against an employee seeking to criticize the very superior empowered to review [the matter] would impermissibly chill first amendment rights"); *Czurlanis v. Albanese*, 721 F.2d 98, 106 (3rd Cir. 1983) ("[a] policy which could compel public employees to route complaints about poor departmental practices to the very officials responsible for those practices would imper-

missibly chill such speech"); *Unruh v. City Council*, 78 Cal. App. 3d 18, 29 n.6 (1978) (confidential disclosures by a police officer which are not made recklessly or in bad faith are constitutionally protected); *Meester v. Davies*, 11 Cal. App. 3d 342, 346 (1970) (police officers have a duty to report to the district attorney or Attorney General any suspected wrongdoing which may involve their superiors).

A. Qualified Immunity

Defendants argue that under *Anderson v. Creighton*, 483 U.S. 635 (1987), this court must decide whether the law in effect at the time of the conduct established that the particular conduct in question was unlawful so that a reasonable official would understand that his or her conduct was unlawful. However, even if the facts, in this case, are as asserted by the defendant, the defendant's actions violated clearly established law and are therefore not within the scope of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As stated above, this court has already held that the law was fully established at the time of the alleged violations by defendants. *See Order, Harris v. Pittsburg*, (CV-86-2101 MHP, N.D. Cal., August 12 1987) at 8-12.

The Ninth Circuit has held that the "existence of [public officials'] reasonable belief that their conduct was lawful, viewed in the light of clearly established law . . . is a question for the trier of fact." *Schlegel v. Bebout*, 841 F.2d 937, 945 (9th Cir. 1988). *See also Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1467 (9th Cir. 1984) (although inquiry whether legal rights are settled may often be best resolved by the trial judge, "the existence of a reasonable belief that a search is lawful, viewed in light of the 'settled' nature of the law, is a question for the trier of fact"); *cf. Wood v. Ostrander*, slip op. at 6902, 6892 (summary judgment not appropriate where plaintiff raised genuine issues of fact as to reasonableness of defendant officer's conduct; also stating that officer is entitled to summary judgment based on qualified immunity if he can show that as a reasonable officer he could have believed his actions were constitutional even if they were not) (citation omitted).

Defendants further argue that their conduct met the test of reasonableness since they relied on advice of counsel and the orders of their superiors. They argue that no laws clearly prohibited such reliance. This misconstrues the test set out in *Anderson* and *Harlow*, which looks to the law at the time of the alleged constitutional violation, not the burgeoning law of "good faith" or qualified immunity. Instead, defendants framed their immunity argument solely by reference to subjective factors.[9]

Additionally, defendants did not raise the defense of qualified immunity in the manner contemplated by the Supreme Court in *Harlow*. *Harlow* envisages that the defendant will be cognizant of and raise the defense before discovery takes place. Since a court's inquiry on qualified immunity turns on the existence of a clear legal standard, no discovery would be required. *Id.* at 818. Once a district court determines that defendant took action that a reasonable officer could not have believed lawful, and defendant claims that his conduct was such that a reasonable official could have believed lawful, then the court may allow further discovery on the immunity issue. *Anderson v. Creighton*, 483 U.S. 635, 646-7 n.6 (1987). One court has held that when a constitutional claim (such as the equal protection violations asserted in this case) requires a showing of intent, discovery may be necessary on the intent issue before the qualified immunity issue may be resolved. *Martin v. District of Columbia Metro. Police Dep't*, 812 F.2d 1425 (D.C. Cir. 1987), *reh'g denied*, 824 F.2d 1240 (D.C. Cir. 1987) *opinion reinstated on reconsideration sub nom. Bartlett on behalf of Neuman v. Bowen*, 824 F.2d 1240 (D.C. Cir. 1987).

In the instant case, defendants raised the defense of qualified immunity on the eve of trial. Discovery was essentially complete. Only after the court had denied the motion for summary judgment on the issue of qualified immunity did counsel depose the attorney upon whose advice defendants allegedly relied. Plaintiff had no opportunity to conduct meaningful discovery on the issue.

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[9] The court, as the trier of fact, was asked to ponder numerous fact-intensive questions such as: what information did defendants give their attorney? Upon what did defendants' attorney base his advice? What did defendants ask the other police chiefs? Exactly what was the response?

Additionally, by their submission of supplemental facts and deposition extracts, *see* Supplemental Statement of Facts in Support of Motion of Hendricks, Castiglione, and Donato for Good Faith Immunity, October 29, 1987, defendants tacitly acknowledged that their qualified immunity defense requires a factual inquiry. *See, also Schwartzman v. Valenzuela*, 846 F.2d 1209, 1211-12 (9th Cir. 1988) (affirming denial of summary judgment where plaintiff, fired in May 1985, had stated a claim and presented evidence from which a jury could reasonably infer that he had been fired for exercising his first amendment rights.)

B. Reliance on Advice of Counsel

Under *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), public officials who prove the existence of "extraordinary circumstances" such that they neither knew nor should have known the legal standard for their conduct may be entitled to qualified immunity. Defendants argue that their reliance on the advice of counsel raises their conduct to this level of extraordinary circumstances considered by *Harlow* which would entitle them to the qualified immunity defense.

There has been some suggestion that reliance on counsel may constitute extraordinary circumstances. *See Watertown Equip. Co. v. Northwest Bank Watertown, N.A.*, 830 F.2d 1487, 1495 (8th Cir. 1987) *appeal denied, cert. denied sub nom. Green v. Watertown Equip. Co.*, ___ U.S. ___, 108 S. Ct. 1723 (1988); M. Schwartz and J. Kirklin, *Section 1983 Litigation: Claims, Defenses and Fees*, 167 (1986) (official's reliance on advice of counsel may be a relevant, although not dispositive, factor in determining whether he or she acted in good faith, though higher-ranking officials and officers with access to counsel may be held to a higher standard of knowledge than subordinates.)

Case law discussing defendants' position demonstrates that reliance on advice of counsel is not a defense when a clearly established right is involved. Constitutional rights exist independently of an official's personal knowledge of them. Although it may be a factor bearing on the question of qualified immunity, reliance on advice of counsel alone will not satisfy an official's burden of acting reasonably. *Watertown Equip. Co.*, 830 F.2d at

1495 (advice of counsel was a pertinent factor but not controlling, since defendants did not confront a "perilous situation"); *Tanner v. Hardy*, 764 F.2d 1024, 1027 (4th Cir. 1985); *Wentz v. Klecker*, 721 F.2d 244, 247 (8th Cir. 1983); *cf. Arnsberg v. United States*, 757 F.2d 971, 982 (9th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986) (reliance on advice of counsel supported immunity because reasonable attorneys could differ in their interpretations of the law, or the threshold issue of the existence of "clearly established" law.)

Lastly, even if defendants can prove that they are entitled to immunity since their conduct was reasonable because they relied upon advice of counsel, the Ninth Circuit has held that "[t]he trial court's determination of reasonable reliance is a finding of fact. . . ." *Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir. 1986). *See also Schlegel v. Bebout*, 841 F.2d 937, 945 (9th Cir. 1988); *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1466-67 (9th Cir. 1984). At this stage, the court finds that there are significant disputed issues of fact regarding whether or not there was reasonable reliance. Summary judgment on this ground is therefore denied.

C. Following Superiors' Orders

Defendant Hendricks claims that he was acting on the orders of his superiors, and that he is therefore entitled to the defense of qualified immunity. Case law rejects this defense. If the actors "knew or should have known that their actions were violating the plaintiffs' constitutional rights, then they will not be allowed to hide behind the cloak of institutional loyalty." *Forsyth v. Kleindienst*, 599 F.2d 1203, 1217 (3rd Cir. 1979), *cert. denied sub nom. Mitchell v. Forsyth*, 453 U.S. 913 (1981), *reh'g denied*, 453 U.S. 928 (1981); *see also Villanueva v. George*, 659 F.2d 851, 855 (8th Cir. 1981), *appeal after remand sub nom. Villanueva v. Leininger*, 707 F.2d 1007 (8th Cir. 1983); *Putman v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981), *appeal after remand*, 701 F.2d 63 (8th Cir. 1983); *see also Raysor v. Port Auth. of New York and New Jersey*, 768 F.2d 34, 38-9 (2d Cir. 1985), *cert. denied*, 475 U.S. 1027 (1986) (rejecting qualified immunity argument since the general tort rule is that an agent is not relieved of liability merely because he or she is acting at the command of a principal,

citing Restatement (Second) of Agency § 343 comments b, d (1958)); *Busche v. Burkee*, 649 F.2d 509, 517 (7th Cir. 1981), *cert. denied sub nom. Burkee v. Busche*, 454 U.S. 897 (1981) (rejecting policeman's argument that he be relieved of personal responsibility because he was acting subject to his superior's orders); *but see Lowe v. Letsinger*, 772 F.2d 308, 313-14 (7th Cir. 1985) (on remand, court would allow clerk to bring evidence of "extraordinary circumstances" to establish qualified immunity defense, since he allegedly acted at the behest of a judge in concealing a decision).

Defendants rely upon *Vela v. White*, 703 F.2d 147 (5th Cir. 1983) to argue that defendant Hendricks should be immune since he was merely following superiors' orders. The Fifth Circuit in *Vela* affirmed the district court's findings of fact and conclusions of law issued after trial, in which one defendant police officer was found immune under a good faith defense from suit alleging unlawful arrest. 703 F.2d at 152. The district court concluded that qualified immunity shielded the officer following superior's orders since the officer was young and inexperienced. *Id.* The defendant who ordered the arrest was found subject to suit. *Id. See also id.* at 150 (no immunity for official who violated clearly established law, regardless of subjective mental state).

Again, the nature of the "reliance on orders of a superior" defense, by definition, requires a factual inquiry and is inappropriate for resolution on summary judgment as contemplated by *Harlow. See Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir. 1986).

II. Equal Protection Claims

Harris also alleged violation of his right to equal protection under the fourteenth amendment. Harris alleged that he received disproportionately harsh discipline for his alleged deviation from department rules, while other similarly situated officers had received little or no discipline. Defendants allege a qualified immunity defense to this claim as well.

Disparate treatment of similarly situated individuals has long been held to violate the equal protection clause, unless a govern-

ment entity can prove that the distinctions have a rational basis. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Distinctions must be reasonable and rest on grounds having a fair and substantial relation to the object being regulated. *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). *See also Washington v. Davis*, 426 U.S. 229 (1976) (successful equal protection claim requires a showing of purposeful discrimination).

Employees who have been subjected to such disparate treatment have long been able to sustain a suit against their employers for equal protection violations. *See, e.g., Thomas v. New Orleans*, 687 F.2d 80, 82-4 (5th Cir. 1982) (upholding jury award to police officer who claimed equal protection violations when he complained of a "widespread and invidious 'blue curtain' within the New Orleans police force" which created a code of silence and punished those who violated it); *Ciechon v. Chicago*, 686 F.2d 511, 522 (7th Cir. 1982) (equal protection rights violated when two paramedics equally responsible for patient assessment and treatment were intentionally treated differently); *Smith v. Georgia*, 684 F.2d 729, 736 (11th Cir. 1982), *appeal after remand*, 749 F.2d 683 (11th Cir. 1983) (an isolated event may violate the right to equal protection if different action is taken against persons similarly situated without showing a rational basis for the disparate treatment); *Zeigler v. Jackson*, 638 F.2d 776, 779 (5th Cir. 1981), *appeal after remand*, 716 F.2d 847 (5th Cir. 1983) (holding that where three other police officers subject to a departmental character requirement were not denied employment despite their criminal convictions, and plaintiff was denied employment, such denial violated his right to equal protection); *Olshock v. Village of Skokie*, 541 F.2d 1254 (7th Cir. 1976) (equal protection violated when policemen who had engaged in protest action and retained counsel were disciplined differently than those who had not retained counsel).

Defendants' claim of qualified immunity as to the conduct involving plaintiff's fourteenth amendment rights requires that the court determine defendants' intent and is rejected for the same reasons set out in sections I(A) and I(B) *supra*.

III. Pendent State Claims

Harris alleged pendent state claims for wrongful termination, and for bad faith breach of the implied covenant of good faith and fair dealing. Harris argues that his termination was retaliatory in nature and that defendants fired him in violation of public policy for speaking out against corruption in the police department. Defendants also assert a qualified immunity defense to these claims.

The United States Supreme Court has stated that it is essential that state employed teachers "be able to speak out freely . . . without fear of retaliatory dismissal." *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968). *See also Perry v. Sinderman*, 408 U.S. 593, 598 (1972) (nonrenewal of even an untenured employee may not be predicated on his or her exercise of first amendment rights).

California courts have also clearly spoken out against retaliatory discharge as a violation of public policy. *See, e.g., Petermann v. International Bhd. of Teamsters*, 174 Cal. App. 2d 184, 189 (1939) (employer's authority to discharge an at-will employee may be limited by consideration of public policy when an employee has simply complied with his or her legal duty); *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 176-77 (1980) (employee's action for wrongful discharge in contravention of public policy subjects an employer to tort liability); *Rulon-Miller v. International Business Machs. Corp.*, 162 Cal. App. 3d 241, 252-53 (1984) (court may consider several factors in determining whether employer terminated employee in good faith or bad faith, including whether the termination was for legitimate business purposes or was a pretext).

Defendants' characterization of their defense to these tort claims as the "good faith" immunity defense is not appropriate. Their arguments raise ordinary defenses and, for the reasons stated above, they are rejected.

CONCLUSION

Harlow and its progeny established that an official acting in reliance on unclear or unsettled areas of law enjoys qualified

immunity from suit. *Harlow* does not grant immunity at the summary judgment stage where, as here, an established legal standard governed defendants' conduct, and defendants' immunity claims can only be resolved after a fact-intensive inquiry.

Defendants' alleged conduct, if proven, violated plaintiff's clearly established rights. Defendants' arguments rely on subjective beliefs and factual assertions that are in dispute, and cannot be resolved on summary judgment. Similarly, the asserted defenses to the state law claims involve disputed factual issues. Accordingly, defendants' motion for summary judgment based on the theory of qualified immunity is DENIED.

IT IS SO ORDERED.

Dated: July 7, 1989

MARILYN HALL PATEL

MARILYN HALL PATEL
United States District Judge

Appendix C

PITTSBURG POLICE DEPARTMENT
55 Civic Avenue
Pittsburg, California

Office Correspondence

To: Sergeant Jack Harris

Date: April 26, 1985
From: Len Castiglione
Chief of Police

SUBJECT: NOTICE OF INTENT TO TERMINATE

This correspondence is to formally advise you that I am proposing that you be terminated from your job of Police Officer/Police Sergeant effective Monday, May 6, 1985 at 0900 hours.

The proposed action is to be taken for the following listed grounds;

A. Violation of City of Pittsburg Civil Service Rule 14.2, Subsections;
   1. (8) Wilful violation of Departmental written Rules
   2. (17) Neglect of Duties

B. Violation of City of Pittsburg Department Rules and Regulations;
   1. 1005.7—Neglect of Duty
   2. 1107.1—Duty to Report
   3. 1201.1—Leadership
   4. 1302.2—Operations
   5. 3103.16—Duties of Sergeants
   6. 3406.2—Vice Control
   7. 3406.3—Vice Control
   8. Temporary General Order 26.1—Evidence/Property Procedures

The afore listed grounds are based on the following acts or omissions as set forth in Pittsburg Police Department Internal Personnel Investigation 05P85.

It is found that on February 15, 1985 you failed to give suitable attention to duty regarding properly securing the area in which a

bindle of cocaine was located, within the locker room of the Pittsburg Police Department.

You failed to properly and adequately secure the bindle as evidence; place it into the proper evidence lockers and protect its validity; document the matter; and you wilfully failed to report this matter of serious concern to department superiors, the Captain, or Chief of Police.

Additional foundation of negligence and violation of these rules is borne out by your wilfull failure to report information of concern, to include but not limited to allegations of criminal conduct by officers of the Pittsburg Police Department, to the Captain or Chief of Police, for a period of time, to include but not limited to, December 1983 to present.

You wilfully failed to report to your superior officer, the Captain or Chief of Police, allegations of misconduct or violations of written department rules by officers of the Pittsburg Police Department.

You wilfully failed to report, or take appropriate action in reporting and documenting your suspicions, opinions, beliefs or information that Lieutenant James Banks and/or officers of the Pittsburg Police Department were suspected to be working under the influence of narcotics and/or alcohol, from a period of time to include, but not limited to February 14, 1985, and prior thereto.

You wilfully failed to set a proper example to subordinates in that on February 15, 1985 you directed Patrolman Carl Webb to violate departmental written rules; and for a period of time to include, but not limited to three to four weeks prior to February 15, 1985 you directed Officer Carl Webb and Officer Richard Maxwell to violate written departmental rules, to include, but not limited to, failing to report suspicions or information of concern to the Captain or Chief of Police, and failed to give them proper direction in documenting information of which would be of serious concern to the department.

Your overall failure and wilful negligence to take the appropriate action in these matters, in accordance with written department rules, established past practices and procedures, and Civil

Service Rules, substantiates the validity of the violations and proposed disciplinary action.

Your actions and omissions in reference to these matters is consistant [sic] with your established practice of objection to the administrative directions and orders of the Chief of Police.

It is consistant [sic] to your past practice of failing and wilfully neglecting to observe and follow the chain of command, rules and regulations, and in notifying the administration of the department and Chief of Police, of facts or circumstances of serious concern to the department.

This is borne out and substantiated by your statements, actions and/or omissions in reference to, but not limited to the following incidents; 1984 Maxwell Shooting Arbitration (02P84); your allegations in respect to improperly conducted internal investigations, to include, but not limited to 10P84 (Sergeant Hunt) and 11P84 (Sergeant Hunt); your actions subsequent to the funeral arrest of Archie Lee Thompson (01P81), on March 28, 1981; your actions subsequent to the Departmental Chief's Meeting of April 2, 1981 in reference to the Thompson arrest; your actions in the KRON Television program entitled "Law and Disorder in Pittsburg", aired for five consecutive days between November 15 and November 19, 1982; your actions in Internal Personnel Investigation 14P83 in reference to the complaint of Sandra Garcia; your actions and statements in reference to the January 24, 1984 meeting between yourself, your attorney Mr. Michael Raines, counsel for the City, Mr. Richard Whitmore, the City Manager and myself; the January 1985 departmental Staff Meeting conducted in Oakland California; and your actions in regards to your failure to attend the departmental Chief's Meeting of July 20, 1984 and subsequent disciplinary action taken in that matter, which you currently have in the process of arbitration.

Copies of the documents, your personnel file, and other material which supports the proposed action are available at the Pittsburg Police Department, in the Office of the Chief of Police, for your review upon specific request during regular business hours.

Should you believe this proposed action should not occur you have the right to respond to me either orally or in writing by Friday, May 3, 1985 at 12 noon.

If you wish to respond orally, please contact my secretary so that a specific time can be established for your oral response. Written response shall be forwarded to my office.

Len Castiglione
Chief of Police

LC/vf

Served by: Len Castiglione Received by: Jack Harris

Date: April 26, 1985 Date: April 26, 1985 11:05 a.m.

No. 91-33

Supreme Court, U.S.
FILED
JUL 17 1991
OFFICE OF THE CLERK

In The Supreme Court
OF THE
United States

OCTOBER TERM, 1991

LEONARD CASTIGLIONE, ANTHONY DONATO,
and WILLIAM HENDRICKS,
Petitioners,

vs.

JACK LEE HARRIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Michael L. Rains
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QUESTIONS PRESENTED

(1) Is it proper to deny a motion for summary judgment predicated upon a claim of qualified immunity in a case arising under 42 U.S.C. § 1983, where, at the time the Defendants wrongfully terminated the plaintiff public employee, the law clearly prohibited public officials from firing employees for exercising their First Amendment rights and where, in any event, there existed important questions of fact regarding the Defendants' motives for firing the public employee?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. The Ninth Circuit Opinion Did Not Conflict with the Standards Established In Harlow v. Fitzgerald and Its Progeny 3

A. Introduction 3

B. The Ninth Circuit Properly Relied on Cases Which Established That Clearly Established Law Prohibited Termination of Public Employees in Retaliation for Exercise of First Amendment Rights 4

C. The Ninth Circuit Correctly Determined That Questions of Fact Precluded Summary Judgment in This Case 5

II. Petitioners' Additional Claims That The Ninth Circuit Otherwise Erred in Upholding the District Court's Denial of Petitioners' Motion for Summary Judgment Do Not State Adequate Grounds For Certiorari and, In Any Event, Are Without Merit 6

CONCLUSION 8

APPENDIX A A-1

APPENDIX B B-1

TABLE OF AUTHORITIES

Page

Allen v. Scribner, 812 F.2d 426 (9th Cir. 1987) 6, 7
Brawner v. City of Richardson, Texas,
855 F.2d 187 (5th Cir. 1988) 4
Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984) 4
Czunlaniz v. Albanese, 721 F.2d 98 (3rd Cir. 1983) 4
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 2, 3, 6, 7
Manhattan Beach Police Officers v. Manhattan Beach,
881 F.2d 816 (9th Cir. 1989) 4
McKinely v. City of Elroy, 705 F.2d 1110 (9th Cir. 1983) ... 4
Meester v. Davies, 11 Cal. App. 3d 342 (1970) 4
Mitchell v. Forsythe, 472 U.S. 511 (1985) 2, 3
Mount Healthy City School Dis. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 4, 5
Obrien v. Town of Caledonia, 748 F.2d 403
(7th Cir. 1984) 4
Perry v. Sindermann, 408 U.S. 593 (1972) 4
Pickering v. Board of Education, 391 U.S. 563 (1968) 7
Schwartzman v. Valenzuela, 866 F.2d 1209 (9th Cir. 1988) .. 4
Sorrano's Gasco, Inc. v. Morgan, 874 F.2d 1310
(9th Cir. 1989) 6, 7
Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988),
cert den. Gardner v. Tribble,
490 U.S. 1075 (1989) 6
Unruh v. City Council, 78 Cal. App. 3d 18 (1978) 4
Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989) 4

42 U.S.C. section 1983 ..... 1, 5-7

STATEMENT OF THE CASE

This case arises out of the termination of Respondent Jack Lee Harris from the Pittsburgh Police Department by Defendant Petitioners on May 11, 1985. Harris was terminated on the pretext that he violated the "chain of command" when he confidentially reported to the district attorney his discovery of cocaine above the locker of a fellow officer in the department.

On April 21, 1986, Harris filed an action in the United States District Court for the Northern District of California alleging claims for violation of 42 U.S.C. section 1983 and pendent state claims for wrongful termination and breach of the implied covenant of good faith and fair dealing.

On September 26, 1986, a labor arbitrator in a related state court arbitration proceeding found, inter alia, that (1) at the time of his discharge, Harris was an employee of exemplary standing; (2) Harris had adequate grounds to mistrust that the Chief of Police would investigate the discovery of police misconduct; (3) Harris' conduct "in speaking out and in his going to the district attorney ... falls within the protection enunciated by the highest court in the Mount Healthy case"; and (4) "the totality of the conduct of the department in this matter does not speak well for it as a source of credible and factual data." (Respondent's Appendix B at pp. B-2-3.)

After previously filing an unsuccessful motion for summary judgment on the merits of the case in the Summer of 1987 (Respondent's Appendix A.), Petitioners filed a "self-styled" motion for summary judgment raising the qualified immunity defense for the first time on September 3, 1987, just days before trial. The district court orally denied the purported motion at the Pre-Trial Conference on the ground that the law regarding the protected character of First Amendment speech was well established in 1985 and on the ground that the motion raised disputed fact questions that made summary judgment inappropriate. Because the district court did not believe that the motion properly constituted a motion for summary judgment, it did not issue a written opinion denying the motion. After the Ninth Circuit stayed the trial it granted a writ of mandate directing the

district court to issue a written order granting or denying summary judgment. On July 9, 1989, the district court filed an exhaustively researched and carefully reasoned opinion in which it characterized Petitioners' affidavits as "uniformly conclusory." In that order the district court referred to its previous written order delaying summary judgment in which it had found that the "subject matter of Harris' disclosure was of great public interest" and, that Harris had properly taken "his concerns to the appropriate external authorities," and after careful examination of Harlow v. Fitzgerald, 457 U.S. 800 (1982) and related cases, held that the law prohibiting such termination was clearly established at the time of Harris' firing and that the motion was procedurally deficient and legally unsound. (Petitioners' Appendix A.)

Petitioners appealed the district court's denial of the motion for summary judgment. The Ninth Circuit affirmed the district court's denial of summary judgment, however, under Harlow v. Fitzgerald, 457 U.S. 800, and Mitchell v. Forsythe, 472 U.S. 511 (1985), holding that the law prohibiting termination of public employees for expression of First Amendment rights has long been clearly established and that issues of fact existed with regard to Petitioners' motives and pretexts for effecting the termination.

REASONS FOR DENYING THE WRIT

I.

The Ninth Circuit Opinion Did Not Conflict with the Standards Established In Harlow v. Fitzgerald and Its Progeny

A. Introduction

In Harlow v. Fitzgerald, this Court restated the qualified immunity doctrine as an objective test:

> ... government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818.

In Harlow, this Court thus provided a standard by which courts could consider constitutional claims and, through the qualified immunity defense, allow public officials to avoid unnecessary "burdens of broad-reaching discovery", and "permit the resolution of many insubstantial claims" at the earliest possible time in the litigation. Id. at 817-818. Following the Harlow decision, this Court further explained that where a plaintiff alleges a violation of a clearly established law and the evidence reveals a genuine issue of material fact as to whether the defendant committed the acts alleged, the qualified immunity defense fails. Mitchell v. Forsythe, 472 U.S. at 526.

Adhering to the principles announced by this Court, the district court and the Ninth Circuit correctly determined in this case that both the clearly established law and the existence of disputed facts precluded summary judgment on grounds of qualified immunity.

B. The Ninth Circuit Properly Relied on Cases Which Established That Clearly Established Law Prohibited Termination of Public Employees in Retaliation for Exercise of First Amendment Rights

It is indisputable that the law was clearly established prior to 1985 that the termination or demotion of a public employee in retaliation for the exercise of First Amendment rights was unconstitutional. See Mount Healthy City School Dis. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Perry v. Sindermann, 408 U.S. 593, 596-597 (1972); Unruh v. City Council, 78 Cal. App. 3d 18, 29 n.6 (1978); Obrien v. Town of Caledonia, 748 F.2d 403 (7th Cir. 1984); Brockell v. Norton, 732 F.2d 664 (8th Cir. 1984); Meester v. Davies, 11 Cal. App. 3d 342 (1970); Czunlaniz v. Albanese, 721 F.2d 98 (3rd Cir. 1983); Schwartzman v. Valenzuela, 866 F.2d 1209 (9th Cir. 1988); McKinely v. City of Elroy, 705 F.2d 1110 (9th Cir. 1983); Manhattan Beach Police Officers v. Manhattan Beach, 881 F.2d 816 (9th Cir. 1989); Brawner v. City of Richardson, Texas, 855 F.2d 187 (5th Cir. 1988); Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989).

Respondent Harris' claim that he was dismissed from the Pittsburg police force in February, 1985, in retaliation for confidentially reporting suspected criminal activities of other members of the police force to the Office of the District Attorney clearly falls within this class of proscribed conduct. Harris' claim that he was fired for exercising his First Amendment rights, moreover, is nothing like a bare allegation that could not withstand judicial scrutiny. Both the arbitrator (whose 43 page written opinion was introduced into evidence on the motion for summary judgment as Exhibit A to Plaintiff's Opposition) and the district court found that the conduct for which Harris was fired directly implicated important First Amendment concerns. Indeed, after hearing twenty-three witnesses over a five day trial-like hearing, the arbitrator concluded that Harris' conduct, "in speaking out ... and in going to the district attorney falls within the protection enunciated by the highest court in the Mt. Healthy case." (Respondent's Appendix B, at p. B-3.) The district court, after careful review of this and other abundant evidence, likewise found that "the subject matter of [Harris] disclosure was of great

public interest and cannot be considered to have been dominated by the co-existing private concern, i.e. [Harris'] retention of his employment." (Respondent's Appendix A at p. A-9.)

Given such findings, it is clear that the Ninth Circuit opinion in this case is perfectly in accord with the principles established by this Court and followed by many, many federal precedents prior to Harris' unconstitutional termination in 1985.

C. The Ninth Circuit Correctly Determined That Questions of Fact Precluded Summary Judgment in This Case

Defendants' primary defense to Harris' section 1983 claim itself raised issues of disputed fact. Defendants admit that Harris found cocaine in the locker room and concede that Harris confidentially reported it to the District Attorney (rather than to the press or the public). They contend, however, that contrary to appearances, they terminated him for "violating the chain of command," not for exercising his First Amendment rights. Thus, Harris' section 1983 claim, like other such cases based upon a theory of unconstitutional retaliatory dismissal almost inevitably do, raised important questions of motive or intent. Indeed, decisions of this Court have expressly acknowledged that such questions are inherent in First Amendment cases.

In Mount Healthy City School Dis. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), for example, the Supreme Court held that a plaintiff alleging retaliation for the exercise of constitutionally protected rights must show that the protected conduct was "a substantial" or "motivating" factor in the defendant's decision. 429 U.S. at 287. Thereafter, the burden shifts to the defendant to establish that it would have reached the same decision regardless of the protected conduct. Id.

Thus, in First Amendment cases like the present one, the Defendants' motive or purpose for terminating the public employee can be critical. In light of such analysis, the Ninth Circuit has held that where a genuine issue of fact exists with regard to the motivation and intent for the alleged retaliatory termination of a public employee, summary judgment on

qualified immunity grounds is improper. Allen v. Scribner, 812 F.2d 426, 436 (9th Cir. 1987); Sorrano's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1319 (9th Cir. 1989). Clearly such holdings, strictly limited as they are to the First Amendment termination cases where often the entire action rests upon whether the stated reason for termination is real or merely pretextual, do not conflict with the standard set forth in Harlow and its progeny.

Because Respondent's section 1983 claim falls within this special class of cases in which the law clearly prohibited the alleged conduct and the element of motivation or intent must be decided by a jury, the Ninth Circuit properly upheld the district court's denial of summary judgment on qualified immunity grounds in this case.[1]

II.

Petitioners' Additional Claims That The Ninth Circuit Otherwise Erred in Upholding the District Court's Denial of Petitioners' Motion for Summary Judgment Do Not State Adequate Grounds For Certiorari and, In Any Event, Are Without Merit

Petitioners' additional claims that the Ninth Circuit (1) failed to apply the proper test in determining whether the law was clearly established at the time of Respondent's dismissal; (2) failed to consider Petitioners' reliance on the advice of counsel as relevant to the issue; and (3) failed to consider the

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[1]Significantly, this Court already has denied a petition for writ of certiorari in Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988), cert den. Gardner v. Tribble, 490 U.S. 1075 (1989), in which petitioners raised the issue of whether the Ninth Circuit properly rejected the qualified immunity defense in a section 1983 case based upon conduct allegedly motivated by an improper purpose. Thus, contrary to Petitioners' assertions in this case, it is clear that this Court considers the similar issue raised in the instant petition settled and inappropriate for review on certiorari.

issue with respect to specific circumstances surrounding one of the several public officials named in this suit fall outside the parameters of those issues which this Court will review on certiorari and, in any event, are without merit.

Generally, the jurisdiction of the Supreme Court on writ of certiorari extends to the review of conflicts in decisions reached between the federal and state courts, among the federal circuit courts, or between the federal circuit courts and this Court. Supreme Court Rule 17. No conflict exists, and, indeed, Petitioners allege no such conflict, among the federal circuit courts on the issue of the applicability of the qualified immunity defense in cases involving allegations under 42 U.S.C. section 1983. Further, contrary to Petitioners' assertion, no conflict exists between this Court's decision in Harlow, and the Ninth Circuit decisions in Allen and Sorrano's Gasco. Accordingly, certiorari is inappropriate in this case.

Even if this Court finds that these issues meet the procedural prerequisites for certiorari, however, they are entirely without merit. Indeed, to argue that the Ninth Circuit failed to conduct the balancing test established in Pickering v. Board of Education, 391 U.S. 563 (1968), is especially ludicrous. In its prior order, denying summary judgment from which these Defendants never appealed, the district court carefully balanced the relevant factors and concluded that Harris' report to the District Attorney was protected by the First Amendment. (Respondent's Appendix A.)

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: July 17, 1991

Respectfully submitted,

CARROLL, BURDICK & McDONOUGH

By _____
Donald T. Ramsey
Attorneys for Respondent
Jack Lee Harris

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DTR:cab

APPENDIX A

In the United States District Court
Northern District of California
No. C-86-2101 MHP

Jack Lee Harris,
Plaintiff,

vs.

City of Pittsburg, et al.,
Defendants.

(Filed August 12, 1987)

ORDER

PATEL, United States District Judge.

The complaint herein states claims under 42 U.S.C. § 1983 for violation of first amendment rights, alleging that Sgt. Jack Harris was fired because he spoke out against the corruption and favoritism that plagued the Pittsburg Police Department. Harris further alleges that his equal protection rights under the fourteenth amendment were violated because he received disproportionately harsh discipline for his asserted deviation from Department rules while others who had acted similarly or had engaged in more serious misconduct received little or no discipline. The complaint also alleges causes of action for wrongful discharge in violation of the covenant of good faith and fair dealing because defendants' termination of Harris was in bad faith and violative of public policy.

During oral argument on July 20, 1987, plaintiffs stipulated that they would voluntarily dismiss defendants Aaron Baker, Joseph Porter and Ted Gargalikis. Plaintiffs also agreed to dismiss their fourth amendment claims; they conceded, moreover, that Ninth Circuit case law bars their ninth amendment and fifth amendment claims. See, respectively, Strandberg v. City of Helena, 791 F.2d 744 (9th Cir. 1986), Johnson v. Barker, 799

F.2d 1396, 1399 n.1 (9th Cir. 1986). The remaining defendants, the City of Pittsburg, Leonard Castiglione, Anthony Donato, James Banks, William Hendricks and David Millecam now move the court to enter an order granting summary judgment to defendants on the remaining grounds:

(1) The facts establish there was no violation of any first amendment rights;

(2) The facts show no violation of due process rights;

(3) The statute of frauds bars plaintiff's eighth cause of action;

(4) No cause of action is stated against plaintiff's fellow employees in the ninth and tenth causes of action;

(5) The facts show no breach of the covenant of good faith and fair dealing.

After careful consideration of the papers and oral argument, the court denies defendants' motion in part and grants defendants' motion in part.

I. Factual and Procedural History

On April 21, 1986, plaintiff Harris filed a complaint with the court alleging that defendants violated plaintiff's civil rights in terminating his employment with the Pittsburg Police Department. Plaintiff was a sworn member of the City of Pittsburg Police Department for approximately 16 years at the time of his discharge on May 10, 1985. Plaintiff was allegedly fired from his position as police officer for not following the proper procedure when he discovered cocaine on top of the locker of a fellow police officer.

The events which led to the firing of Sgt. Harris began on February 15, 1985 when a fellow police officer, Carl Webb, notified supervisor Harris that he had found a small white packet in a box that was on top of a locker in the department's locker room. Harris took charge of the packet, which was later

determined to contain cocaine. Later that morning Harris made contact with the Contra Costa District Attorney, and, on that same day, submitted the packet and a report thereon to the District Attorney's investigator, Alan Sjostrand. Harris was asked by the District Attorney to keep the matter confidential. Neither Harris nor Webb made a further report of the incident to the Pittsburg Police Department's higher officials.

The District Attorney's staff initiated an immediate investigation of the matter and notified the Chief of Police, Leonard Castiglione, of the case. Upon receiving the District Attorney's report in March 1985, a further City investigation was effected which resulted in the discipline of Officer Webb with a two day suspension and the termination from employment of Sgt. Harris.

Defendants argue that Harris willfully violated both City Civil Service Rules and Police Department Rules and Regulations in the manner in which he responded to this crime. They assert that by Harris' reporting the matter directly to the Contra Costa County District Attorney's office, Harris knowledgeably and willfully circumvented the chain of command, and did so knowing he was violating the Department's Rules and Regulations.

Defendants also argue that Harris was negligent in his conduct in that he failed to secure the scene of the crime, to properly handle the suspected contraband, and to otherwise properly investigate the matter. Defendants further allege that in reporting this matter to the District Attorney, Harris made serious irresponsible accusations against both subordinate and superior officers.

The City asserts, based upon these allegations, that Harris is no longer suitable for employment as a police officer, even though his tenure in the department spanned 16 years during which time he received only one written reprimand. Of 22 performance evaluations, 15 were of "exceeds requirements" standing, and five were "meets requirements" standing.

It is Harris' position that his confidential report to the District Attorney's office on February 15th was a course of conduct protected from retaliatory discipline. Harris argues that he had to avoid proceeding through the internal affairs process because his superiors, some of whom are the defendants in this action, are involved in a corrupt conspiracy within the police department. Harris alleges that his termination was prompted not so much by his actions in this matter, but because he is not one of police chief Castiglione's "boys." Harris explains further that Castiglione intensely disliked Harris' forthright participation in the KRON-TV series in late 1982 which addressed charges of corruption, mismanagement, and favoritism within the Department.

In the spring of 1986, prior to proceeding with the instant complaint, Harris pursued an administrative appeal of his termination through an arbitration proceeding conducted under the Civil Service Rules of Defendant City of Pittsburg. After a five day arbitration at which 26 witnesses appeared, the arbitrator found that "Sgt. Harris knew his job and always performed it professionally and at times even too zealously and thereby not always pleasing the top command." Voluntary Arbitration In the Matter of Arbitration Between City of Pittsburg and Sergeant Jack Harris, State of California C.S.M.C.S. Case No. 841786, ("Arbitrator's Report"), September 26, 1986 at 32. The arbitrator further found that:

> [t]he various instances of very limited or no discipline meted out by the Chief [Castiglione] to officers found to have committed serious acts of misconduct . . . reflect a fact of life in the Department that anyone working there must take to mean that if you're on the Chief's side you can get off easy on disciplinary raps, but if you're not, you had better watch out. The favoritism and lack of even-handed justice is reflected in the repeated incidents detailed by Sgt. Harris and not effectively rebutted by the City.

Arbitrator's Report at 35.

The arbitrator further found that Harris' fear of going through departmental channels was realistic. Having considered the testimony of all parties the arbitrator found that

> Sgt. Jack Harris had adequate grounds to mistrust the Chief. Harris had observed first hand the way members of the force who were close personal and political friends of the Chief had been let off with either no discipline at all or very light disciplinary actions, so he acted as he did. Harris knew of the criminal conduct of some officers, of the filing of false criminal information by at least one other officer, of the meaningless discipline meted out to the officer to whom a woman had reported the threat of rape and who told the woman "... you might enjoy it", [sic] . . . of the conduct of Lt. Millecam in that officer's making certain that a personal friend was not arrested for a felony drunk driving charge. . . .

Arbitrator's Report at 37-8.

The arbitrator analyzed not only the favoritism existing in the Pittsburg Police Department under Castiglione, but also the particulars surrounding the finding and handling of cocaine at the police station when Harris was on duty.

> The City makes a great deal of the lack of protection of the crime scene in the Department's locker room on February 15 by Sgt. Harris. First the initial scene of the crime was discovered by Officer Webb and witnessed by Officer Riggenberg and for over two hours they were the ones to establish control of the crime scene and did not do so; second, it is seriously questionable whether a locale such as a police officer's locker room can (or should under these circumstances) be sequestered as an out-of-bounds area. To do so would have immediately tipped anyone involved in any potential or actual criminal activity and in view of the history of events in this

> Department I cannot fault Sgt. Harris for not acting in accordance with the Rules to protect this scene of the crime.

Arbitrator's Report at 39.

Given the foregoing, after hearing the testimony and considering the written submissions in this case, the arbitrator reduced Harris' termination from employment to a suspension of one calendar week and ordered, in addition, that Harris be fully reinstated to his former position and made whole for any loss of pay and benefits suffered as a result of the action taken against him. Arbitrator's Report at 43. While the arbitrator authorized a five-day suspension for Harris' technical violation of Department rules, the arbitrator concluded that Harris had been subjected to discriminatory and retaliatory discharge in violation of his first amendment rights. Arbitrator's Report at 42.

Despite the finding of the arbitrator, defendants seek summary judgment as to all claims and all parties, arguing, on the basis of uniformly conclusory affidavits, that Harris' confidential report to the District Attorney regarding the discovery of cocaine in the police locker room was disruptive to the Pittsburg Police.

II. Legal Standard

Summary judgment is appropriate only if there are no disputed genuine issues of material fact. Fed. R. Civ. P. 56(c); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 882 (9th Cir. 1980). In evaluating whether the granting of summary judgment is proper, the evidence must be viewed in a manner most favorable to the plaintiff. Gaines v. Haughton, 645 F.2d 761, 769 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982).

The court, viewing the evidence in this light, holds that a fair resolution of the issues raised in this case requires a full trial on the merits, especially as it is well established that summary judgment is generally improper in cases where the termination of a public employee implicates constitutional issues: "[w]here the employer's explicit justifications for dismissal arguably implicate

constitutionally protected rights, summary judgment is particularly inappropriate." Peacock v. Duval, 694 F.2d 644, 647 (9th Cir. 1982).

In this case, summary judgment must be denied in part and granted in part for the reasons set forth below.

A. First Amendment Claims

Defendants' motion for summary judgment as to Harris' claims that defendants violated his first amendment rights must be denied because defendants are required to demonstrate by a preponderance of evidence that the decision to terminate Jack Harris would have been reached even if Harris had not engaged in constitutionally protected conduct. Id. at 645.

Merely because Harris' speech may have had the effect of "irritating or even harassing" certain members of the police department "does not mean that such speech is stripped of its First Amendment protection." Id. at 647. Nor is it possible to strip him of that protection because some of his speech "may have been 'falsely critical'." Id.

Sgt. Harris had the right to speak out and he did so; the United States Supreme Court has affirmed this. See e.g., Pickering v. Board of Education, 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983). Other courts have also found that "policemen, like teachers and lawyers are not relegated to a watered-down version of constitutional rights." Kannisto v. City and County of San Francisco, 541 F.2d 841, 843 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977). A police officer's right to first amendment protection is "substantial because, as a member of the department, he is a person 'extraordinarily able to inform the public of deficiencies in this important governmental department.'" Id. (quoting Pickering v. Board of Education, 391 U.S. at 572). While courts have also placed limitations on individuals' expressions, e.g., as in Pickering v. Board of Education and Connick v. Myers, Sgt. Harris' conduct is not affected by such restrictions. The United States Supreme Court in Pickering clearly states that "a balance between the interests of the

[employee], as a citizen, . . . and the interests of the State, as the employer, . . ." must be struck. 391 U.S. at 568.

The balancing test enunciated in Pickering cannot ordinarily be resolved by summary judgment because the legitimacy of the employer's concern with disruption, and the sincerity of his articulated motive for taking punitive action, are simply not susceptible to summary disposition.

Contrary to defendants' argument, the Supreme Court's decision in Connick affirms that Harris' claims are best decided at trial, not on summary judgment. As the Court pointed out: "[t]he inquiry into the protected status of speech is one of law, not fact." 461 U.S. at 148, n.7. To be clear,

> [w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.

Id. at 1690. Plaintiff has made a strong showing that the communication here was on a matter of public concern. Thus, the defendants' burden in justifying their actions is substantial and requires a full factual inquiry in order to assess and balance the competing interests.

In addition, there is precedent that the breach of the chain of command by a confidential report to an investigative agency is entitled to be protected under the First Amendment. In a factual context virtually identical to the present case, the Eighth Circuit held that a "private call to an authority positioned to make quick investigation and resolution" of alleged improprieties within a police department is protected. Brockell v. Norton, 732 F.2d 664, 668 (8th Cir. 1984). Where there was "unlikelihood of proper resolution of the matter if kept in the chain of command," id. at 667, the enforcement of the chain of command rule "against an employee seeking to criticize the very superior empowered to review [the matter at hand] would imper missibly chill first amendment rights." Id. at 668 (quoting Atcherson v. Siebenmann, 605 F.2d 1058, 1063 n.5 (8th Cir. 1979)). The Third Circuit has made a similar point: "[al policy which could compel

public employees to route complaints about poor departmental practices to the very officials responsible for those practices would impermissibly chill such speech." Czurlanis v. Albanese, 721 F.2d 98, 106 (3rd Cir. 1983).

In O'Brien v. Town of Caledonia, 748 F.2d 403 (7th Cir. 1984), the court granted a preliminary injunction against retaliatory discipline imposed upon a police officer who communicated his concerns about irregularities to his own attorney, the District Attorney, the local judiciary, and the FBI, in violation of a departmental rule requiring officers to keep such matters confidential, stating:

> while we do not wish to encourage disobedience in public employees, neither can we permit a governmental body to insulate itself from public scrutiny by declaring all its official business to be confidential.

Id. at 407. This court finds that like O'Brien, Harris "took his concerns to the appropriate external authorities and any disruption caused thereby must be accepted as incidental." Id. Moreover, "the subject matter of [Harris'] disclosure was of great public interest and cannot be considered to have been dominated by the co-existing private concern, i.e., [Harris'] retention of his employment. Id. at 407-08.

Similarly, in Unruh v. City Council, 78 Cal. App. 3d 18 (1978), the court concluded that confidential disclosures by a police officer which are not made recklessly or in bad faith are protected as a matter of law. Id. at 29, n.6. Indeed, where an officer suspects that there is wrongdoing which may involve his superiors, it is his duty to report to the District Attorney:

> it is the duty of a police officer to investigate suspected wrongdoing in the city, whether it be that of a citizen or of the chief of police, and where the chief is involved it is the officer's duty to deliver any evidence he obtains to the district

> attorney or the Attorney General; he certainly cannot be expected to give it to the chief.

Meester v. Davies, 11 Cal. App. 3d 342, 346 (1970).

B. Fourteenth Amendment Claims

Plaintiff argues in his opposition to summary judgment that his rights to equal protection were infringed upon when he received disproportionately harsh discipline. However, plaintiff has not pleaded an equal protection violation.

Plaintiff's second amended complaint, drafted by an attorney no longer representing plaintiff, originally pled that Harris, a white male, was the victim of class or racial discrimination. The court rejected this theory of liability, declining to find Harris the member of any protected class. Accordingly, plaintiff's claim under 42 U.S.C. § 1985 was dismissed.

Plaintiff's present pleading gives no notice of any claim that plaintiff's rights to equal protection were infringed upon. Harris' current civil rights causes of action are limited to 42 U.S.C. § 1983. Plaintiff specifically enumerates in paragraph 45 of his complaint, his first § 1983 cause of action, plaintiff's constitutional rights which were allegedly violated by the defendants. Those rights are: (a) the first amendment right to speak freely; (b) fourth and ninth amendment rights to be free from interference; and, (c) the right not to be deprived of life, liberty, or property without due process of law under the fifth and fourteenth amendments. Denial of equal protection is not asserted. Nevertheless equal protection is briefed and argued by all parties to the motion.

The equal protection clause does not require "absolute equality," Douglas v. California, 372 U.S. 353, 357 (1963), nor does it require that all persons be dealt with identically, Baxstrom v. Herold, 383 U.S. 107, 111 (1966). It does not prevent the state from treating persons differently based on factual differences between them, but rather is intended to prevent purposeful discrimination without rational justification. Mobile v. Borden, 446 U.S. 55 (1980).

In this case, Harris received disproportionate punishment for his alleged misconduct while others, whose conduct was far more egregious, were sometimes not even subject to internal affairs interrogations, and, in some cases, were not disciplined at all, or received only slight punishment. Defendants neither discuss nor explain the instances of disparate punishment, despite the arbitrator's findings that disparate treatment occurred. Arbitrator's Report at 34-5, 37, 41.

Disparate treatment of similarly situated individuals violates the equal protection clause unless the government entity can prove that such distinctions have a rational basis:

> if distinctions between similarly situated individuals are to withstand an equal protection analysis, such distinctions must be reasonable, not arbitrary. . .

Zeigler v. Jackson, 638 F.2d 776, 779 (5th Cir. 1981). The Eleventh Circuit has written similarly:

> even an isolated event may contravene the equal protection clause if different action is taken against persons similarly situated without showing any rational basis for the disparate treatment.

Smith v. State of Georgia, 684 F.2d 7291 736 (11th Cir. 1982).

A significant showing has been made that the decision to terminate Harris did not conform to due process and equal protection, but rather to the Department's own practice of favoring the political and personal supporters of the police chief. See Arbitrator's Report. In reviewing the complaint drafted by prior counsel, and the papers submitted in this case since the initial complaint was filed, the court finds that it will not prejudice defendants to allow plaintiff to amend the second amended complaint according to the theories already propounded in this case under the equal protection doctrine. Defendants will not be prejudiced by this course; defendants have responded to papers up to and including this point in the litigation under equal protection theory. Accordingly, the court orders that any

amendments so filed must be in accordance with the theories raised heretofore, and that such amendments must specify the damages for which, under an equal protection theory, plaintiffs hope to recover.

C. Pendent State Claims

Summary judgment as to Harris' pendent state claims of wrongful termination are also denied because the termination appears to have violated public policy.

1. Harris' Eighth Claim

Defendants maintain that Harris' claim for wrongful discharge should be dismissed because it is barred by the statute of frauds. Defendants rely on the fact that the complaint alleges that Harris was hired pursuant to an oral contract, which is not enforceable if the employment was intended to last longer than one year. See Complaint, at ¶ 79. In the present case, Harris could not be discharged in the absence of good cause under the City of Pittsburg Civil Service Rules, Rule XIV. As such, Harris was a permanent employee and can bring an action for breach of contract upon proof that he was terminated without good cause.

The sole case cited by defendants in support of dismissal on the grounds that enforcement of Harris' contract is barred by the statute of frauds, Newfield v.Insurance Company of the West, 156 Cal. App. 3d 440 (1984), has been rejected by the Court of Appeals for the Ninth Circuit as "not representative of California law." See Eisenburg v. Insurance Company of North America, 815 F.2d 1285, 1291 (9th Cir. 1987). Therefore, both the factual and legal bases of defendants' motion for summary judgment on this ground are fallacious and the motion is denied.

2. Harris' Ninth and Tenth Claims

Harris argues he was terminated in accordance with the department's policy and practice "of shielding and protecting from criminal and civil liability certain supporters of the Chief of Police and other city officials." Complaint at 19. As such, his

termination violated the public policy of impartial and thorough investigation of suspected criminal misconduct by officials.

Harris' claim of wrongful termination is also predicated upon defendants' violating the covenant of good faith and fair dealing, and that they fired him without probable cause in a selective and discriminatory manner. The complaint details allegations of favoritism within the department. Complaint, at ¶¶ 21 & 20, 27, 31, 32, 33. These allegations have been substantiated by the Arbitrators's Opinion and Award which, although not controlling in this court, is admissible in evidence in this action. McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984).

Moreover, the Court explains that:

> [w]here an arbitral determination gives full consideration to an employee's..... rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.

Id. at 292-93 n.13 (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974)). Summary judgment on these counts is therefore denied.

3. Harris' Claim of Bad Faith against Defendants Porter and Millecam

It is not clear whether, in paragraph 90a of his complaint, Harris is stating a cause of action for bad faith against defendants Porter and Millecam, whom he alleges failed to assess his performance accurately. In the event that Harris is attempting to state such a claim, the court must disallow it. Fellow employees are not parties to the contract between the employer and the employee, and, as such, they cannot be liable for an alleged breach of any covenant or duty implied by the contract. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 581 (1973); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 456 (1980).

In sum, defendants may not avoid a trial on the issues in this case as the record before the court presents genuine issues of material fact regarding defendants' motives for terminating Harris. These issues may not properly be resolved on summary judgment. Therefore, the court, having considered the arguments of counsel and being fully advised as to the issues, denies in part and grants in part the motion for summary judgment by defendants City of Pittsburg, Leonard Castiglione, Anthony Donato, James Banks, William Hendricks and David Millecam.

III. Motions to Strike and for Sanctions

The parties have made counter-motions to strike certain evidence. As indicated from the bench, the evidence targeted by the motions is either admissible or appropriate for consideration on summary judgment. The bench ruling as made on the record will therefore not be addressed here, save two. One set of exhibits attached by plaintiff consisted of boilerplate declarations. The court had admitted them, but has given them little weight because they are nearly identical and do not appear to represent the thoughtful, individual statements of the declarants. Another exhibit objected to was the record of the arbitrator. The findings of a factfinder such as an arbitrator may be admissible if the proceeding has the indicia of trustworthiness. See McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984). The record before the arbitrator in this case is thorough. The witnesses were placed under oath. An opportunity for defendants to cross-examine was available. The arbitrator's findings were detailed and supported by the record. The court finds they are properly admissible.

Given the disposition of the claims above, and the reasons the court has given therefor, the motion for sanctions is accordingly denied.

>HarrJ1\P.5
DTR:cab

APPENDIX B

Voluntary Arbitration
State of California C.S.M.C.S. Case No. 841786

In the Matter of Arbitration
Between

City of Pittsburg
and
Sergeant Jack Harris.

ARBITRATOR'S OPTION AND AWARD

Representing the City of Pittsburg:

RICHARD C. BOLANOS, ESQ.
Whitmore, Kay & Stevens
145 California Avenue, #204
Palo Alto, California 94306

Representing the grievant, Sgt. Jack Harris:

MICHAEL L. RAINS, ESQ.
Carroll, Burdick & McDonough
One Ecker Bldg., Suite 400
San Francisco, California 94105

This matter was heard on the dates of March 12, 13, 14, April 7 and 8, 1986 in Concord, California. The Arbitrator, Julius N. Draznin, was chosen by the parties from a panel of arbitrators submitted to it by the Department of Industrial Relations, Mediation and Conciliation Service, State of California....

[Arbitrator's Opinion at pages 2 through 40 omitted]

CONCLUSION AND FINDINGS

There is no doubt in my mind from this record, the credible testimony, the evidence and the arguments that Sgt. Jack

Harris was technically guilty of violating the Department's Rules in going outside the chain of command on February 15, 1985 in his contacting the District Attorney's office (whose personnel were fully cooperative throughout this hearing and one of their investigators appeared as a witness) and not filing any report or other notice with his own Department. The question is whether the discipline enforced here in the light of this record is a proper one.

The disciplines meted out to other officers for misconduct in at least as serious misconduct, and I agree with counsel for Sgt. Harris even far more serious than Harris' conduct here, was at the most a thirty day suspension for an officer submitting a false college transcript. Other serious offenses such as Lt. Millecam's misconduct of falsifying reports, of suppressing a felony drunk driving crime resulted in a ten-day suspension, and other serious misconduct resulted in similar or even lesser disciplines. The Chief may not like Sgt. Harris but that does not give him license to discharge him based upon this record.

The totality of the conduct of the Department in this matter does not speak well for it as a source of credible and factual data from which it might be expected to act in a fair and even handed manner towards all of its personnel.

I have duly noted the various citations offered by each side but I find no need to dissect and explore each of them in this case.

Sgt. Harris had the right to speak out and he did so, the U.S. Supreme Court has affirmed this. While courts have also placed limitations on individuals' expressions as in the Pickering case (391 U.S. 563), and the Unruh case (78 Cal. 3d), and the Connick case (461 U.S. 138), I do not see that Sgt. Harris' conduct here is affected by such restrictions. The grievant's activity in his leadership of the Benefit Association is certainly not one that is circumscribed by any decisions I have read or that have been brought to my attention. The U.S. Supreme Court in the Mt. Healthy City School case (429 U.S. 274, 282) clearly states that a "balance must be struck between the interests of the (employee) as a citizen...and the interests of the State, as the

employer..." Sgt. Harris' conduct in his speaking out and in his going to the District Attorney under all of the circumstances present in this case falls within the protection enunciated by the highest court in the Mt. Healthy case.

I appreciate the sense of unease that Chief Castiglione may feel from time to time having Sgt. Harris on his staff but that is no excuse for him to apply the ultimate industrial punishment of termination of employment as he has here.

Sergeant Harris stated that he believed he could work in the Department, for the community and for the Chief. His record shows he has done that for over 15 years and done it well. I see no reason to doubt him now.

AWARD

Based upon the past record of disciplinary actions taken by the Department in effecting suspensions for lengths of time up to thirty days as a maximum for conduct which I believe was at least more serious than this case presents, and for all of the other reasons set forth above, I am directing that Sgt. Jack Harris' termination from employment be and it is hereby reduced to a suspension of one week (a calendar week) and that he be fully reinstated to his former position and made whole for any loss of pay and benefits suffered as a result of the action taken against him.

DATED: September 26, 1986
Los Angeles, California

JULIUS N. DRAZNIN
Hearing Officer

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